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No. 79-100

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT A. GRIMES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court issued no written opinion. The opinion and order of the court of appeals (Pet. App. 1a-3a) is not yet published.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1979. The petition for a writ of cer-

tiorari was filed on July 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the district court correctly admitted evidence obtained from the placement of mail covers on petitioner's home and office.

2. Whether the testimony of a special agent of the Internal Revenue Service concerning the results of a prior criminal investigation of the income tax liability of a third party was properly admitted.

3. Whether the district court correctly allowed the government's expert ink analyst to testify as to the date upon which a certain type of ink became available to the general public.

4. Whether the prosecutor's examination of petitioner's son was prejudicial to petitioner.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on two counts of attempted income tax evasion, in violation of 26 U.S.C. 7201. The district court sentenced him to two concurrent 30-day terms of imprisonment and imposed a $5,000 fine on each count.

Petitioner is an attorney engaged in the practice of law in Flint, Michigan. At trial, the government employed the net worth and personal expenditures method of proof to establish that petitioner understated his taxable income by $49,053.93 in 1971 and

$65,291.19 in 1972, which resulted in underpayments of income tax liabilities of $24,364 and $32,944.12, respectively (GX 139).[1]

Petitioner's defense consisted primarily of an attempt to show that the government's opening net worth figures were inaccurate because on December 31, 1970 (the date for which the opening net worth figures were calculated), he had substantial assets in the form of a "cash hoard" and loans receivable from a personal friend, Connie Moody, for which he was not given credit in the government's computations. Petitioner also claimed that a portion of the increase in his net worth during the years in question could be accounted for by income that was admittedly received but was not reported because of clerical and bookkeeping errors, and by funds that he had received from clients but had not reported as taxable income because he believed that they were loans or advances against anticipated costs of future litigation.

The court of appeals affirmed. It concluded that petitioner "was accorded a fair trial and no error intervened to deny him of any substantial right" (Pet. App. 3a).

ARGUMENT

1. The district court correctly refused to suppress evidence obtained by the government from two mail covers placed on petitioner's home and office.[2] Peti-

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[1] "GX" refers to the government exhibits presented at trial; "Tr." refers to the trial transcript.

[2] The record does not reveal which evidence was obtained from the use of the mail covers. The special agent at whose

tioner argues (Pet. 7-10) that the use of the mail covers violated his Fourth Amendment right to privacy and alternatively contends that the Postal Service has no statutory authority to issue regulations permitting the use of mail covers.

It is well settled that the use of mail covers does not violate the Fourth Amendment rights of either the sender or the recipient of mailed material. See, *e.g.*, *United States* v. *Choate*, 576 F.2d 165 (9th Cir. 1978), cert. denied, No. 78-42 (Nov. 6, 1978); *United States* v. *Bianco*, 534 F.2d 501 (2d Cir.), cert. denied, 429 U.S. 822 (1976); *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *United States* v. *Balistrieri*, 403 F.2d 472 (7th Cir. 1968); *Lustiger* v. *United States*, 386 F.2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *Canaday* v. *United States*, 354 F.2d 849 (8th Cir. 1966); *United States* v. *Schwartz*, 283 F.2d 107 (3d Cir. 1960), cert. denied, 364 U.S. 942 (1961); *United States* v. *Costello*, 255 F.2d 876 (2d Cir.), cert. denied, 357 U.S. 937 (1958).

These authorities are entirely consistent with the rationale of this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967). There, the Court held that the warrantless use of an electronic listening

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request the mail covers were issued testified (Tr. 29-38) that they yielded little information that he had not already obtained from the revenue agent's report. The district court, however, did not consider the question of an independent source. It ruled that the government's mail covers were lawful (Tr. 72-74).

device affixed to the exterior of a public telephone booth in order to hear the telephone user's conversation violated the Fourth Amendment. In so holding, the Court noted that a person using a telephone booth "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world" (389 U.S. at 352). But the Court recognized (*id.* at 351) that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

Here, petitioner had no reasonable expectation that the information on the exterior of an envelope would remain unobserved. Although the Fourth Amendment prohibits warrantless opening of sealed letters and packages, *Ex parte Jackson*, 96 U.S. 727 (1877); *United States* v. *Chadwick*, 433 U.S. 1, 10-11 (1977), there was no such opening here. All that was done was to record information from the outside of certain envelopes. See also *United States* v. *Miller*, 425 U.S. 435, 442 (1976).

Thus, this case is far closer to *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), where the Court held that the warrantless inspection of the exterior, and subsequent 29-hour detention, of first class mail did not violate the Fourth Amendment. As the Court stated: "No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited [with the post office]. The significant Fourth Amendment interest was in the privacy of

this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained" (*id.* at 253). In placing his return address on an envelope, the sender "knowingly exposes [his identity] to the public" so that information "is not a subject of Fourth Amendment protection" (*Katz*, *supra*, 389 U.S. at 351). Indeed, the very purpose of a sender in placing his return address on an envelope is to advise the Postal Service where to return the mail if it cannot be delivered to the addressee. There is accordingly no legitimate privacy interest in such information that would be protected by the Fourth Amendment.

Contrary to petitioner's further argument (Pet. 9), the fact that he disclosed the information to postal employees for the limited purpose of routing his mail does not alter the Fourth Amendment analysis. This Court has consistently held that information voluntarily disclosed to third parties is not protected by the Fourth Amendment even if the disclosure was made with the expectation that the person to whom it was made would not repeat the communication, or that the information would be used only for a limited purpose. See, *e.g.*, *Smith* v. *Maryland*, No. 78-5374 (June 20, 1979) slip op. 8-9; *United States* v. *Miller*, *supra*, 425 U.S. at 442-443.

Finally, petitioner contends (Pet. 8-9) that the Postal Service has exceeded its statutory authority in promulgating the mail cover regulations. The pertinent statute, 39 U.S.C. 401(2), confers upon the Postal Service the broad general power to "adopt,

amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title." The mail cover regulations are directly concerned with postal operations, and are, therefore, within the Postal Service's rulemaking power. Contrary to petitioner's suggestion (Pet. 8), such interagency cooperation in the investigation of crime is entirely proper. See, *e.g.*, *In re Perlin*, 589 F.2d 260, 267 (7th Cir. 1978). In any event, the presence or absence of authority for issuance of regulations on the subject of mail covers does not alter the fact that petitioner has no constitutionally protected privacy interest at stake, and, at lease in the absence of a statutory prohibition against mail covers, affords no basis for exclusion of evidence in a criminal case.

2. Petitioner further argues (Pet. 10-11) that the district court's admission of the special agent's testimony regarding his prior criminal tax investigation of petitioner's friend, Connie Moody, conflicts with *United States* v. *Brown*, 548 F.2d 1194 (5th Cir. 1977).

The pertinent facts are as follows: petitioner testified (Tr. 1796-1797) that as of December 31, 1970, the total amount of loans owed him by Moody (who had died prior to trial) was approximately $60,000, rather than the $27,862.50 for which the government had given him credit on its net worth schedule. In rebuttal, the government called a special agent who testified that he had conducted a criminal income tax investigation of Moody's finances for 1969-1972 using the net worth method to reconstruct his income for

that period, and that during the course of the investigation he had personally seen no evidence of the additional loans that petitioner claimed existed.

The testimony which petitioner objects to was as follows (Tr. 2314):

> Q. Did he [Connie Moody] provide you with any other documentation of any loan transtions?
>
> A. No, he did not.
>
> Q. Mr. Georgeoff, did you discover any evidence of 55 to 60 thousand dollars worth of loan transactions between Mr. Moody and Mr. Grimes and the repayment in 1971 and 1972?
>
> A. No, sir.

United States v. *Brown*, *supra*, upon which petitioner relies (Pet. 10, 11), is not to the contrary. There, the court reversed the conviction of an income tax return preparer where the district court permitted an internal revenue agent to testify solely from memory that the Service had audited approximately 160 returns prepared by the defendant, and had found that 90 to 95 percent of those returns contained overstated deductions (548 F.2d at 1198). Here, on the other hand, the agent merely stated that he personally had not seen any evidence of the additional loans claimed by petitioner. Unlike *Brown*, the agent's testimony in this case described only his own personal experience and did not depend upon the truthfulness of the statements of other persons who did not testify at trial.

3. Petitioner also argues (Pet. 11) that the district court "allowed into evidence the testimony of a representative of the Bic Company who was not present in court."

The facts pertinent to this claim are as follows: At trial, the government offered into evidence a document (GX 73) which it contended petitioner had backdated in a fraudulent effort to establish that monies he had received from former clients were loans or advances against the anticipated costs of future litigation, rather than taxable income as the government contended (Tr. 1106-1127). The district court permitted the government to present the testimony of Albert Lyter, whom the court qualified and accepted as an expert ink analyst. Lyter testified (Tr. 1133-1140) that in his opinion the ink in petitioner's signature was a type that was not available to the general public until after the date on which the document was purportedly executed. A letter (GX 76) from a representative of the Bic Company was admitted in evidence during Lyter's testimony. The court subsequently decided that the letter was not admissible and withdrew the letter from evidence, but it permitted the witness to refer to the letter under Rule 703 of the Federal Rules of Evidence (Tr. 1157 to 1157-3). The court then instructed the jury that it could consider the letter for the limited purpose of evaluating the credibility of Lyter's testimony and it could not be considered as evidence to prove the truth of the facts it contained (Tr. 1157-6).

Petitioner argues (Pet. 11) that Lyter should not have been allowed to testify as to when the ink became available for public use because his only knowledge of that fact came from a hearsay source which was not independently admissible in evidence. But Rule 703 of the Federal Rules of Evidence expressly provides that an expert's opinion may be based upon facts or data which are not themselves admissible at trial, if those facts are of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Here, the date upon which the ink became available to the general public was an essential element of Lyter's opinion that petitioner's signature could not have been placed upon the document until after the date on which the document was purportedly executed. The record amply supports the conclusion that the letter was a source of information upon which experts in the field of ink analysis reasonably rely. Lyter testified (Tr. 1148-1149) that the letter had not been solicited in preparation for this trial, but rather had been received well in advance of trial in response to an inquiry unconnected with this case. It was taken from a general reference file maintained by the Bureau of Alcohol, Tobacco, and Firearms dealing with the particular type of ink involved in this case. Lyter further testified (Tr. 1140) that the letter was part of the records kept in the normal course of his business. The trial court therefore properly admitted into evidence Lyter's reference to the letter under Rule 703 for the purpose of illustrating the basis of his

opinion. The burden was then on petitioner to cross-examine Lyter and attempt to impeach him by attacking the basis of his opinion. *Bryan* v. *John Bean Division of FMC Corp.*, 566 F.2d 541, 545 (5th Cir. 1978).

4. Finally, petitioner argues (Pet. 11-13) that the prosecutor's questioning of his son, Frederick Grimes, was prejudicial. At trial, the prosecution called Frederick Grimes as a witness for the government. On direct examination, Frederick Grimes testified (Tr. 805) that during the prosecution years he was a co-owner of the office building where petitioner's law office is located. When asked if he had received rental payments from petitioner prior to 1972, he refused to answer, claiming the Fifth Amendment privilege against compulsory self-incrimination (Tr. 808).[3] The district court instructed the jury that they were to disregard Frederick Grimes' refusal to answer in their evaluation of the case (Tr. 865-866).

On these facts, the district court correctly denied petitioner's motion for a mistrial (Tr. 846-847). As the court found, the prosecutor did not make an intentional attempt to build his case from inferences drawn from the claim of the privilege by Frederick Grimes. See *Namet* v. *United States*, 373 U.S. 179, 186 (1963); *United States* v. *King*, 461 F.2d 53 (8th Cir. 1972). The court specifically found that the

[3] In 1965, petitioner purchased the building, and shortly thereafter he deeded it to his children. He then leased his office space back from them and claimed deductions on his income tax return for the rent allegedly paid (Tr. 1747-1748; GX 1E, 1F).

prosecutor had asked the question in the good faith belief that Frederick Grimes could not properly assert the privilege to the question asked (Tr. 846-847).[4] The question to which he asserted the privilege was only one of many that were asked and that he answered. Indeed, he gave substantial, relevant, unprivileged testimony concerning petitioner's financial affairs during the period in question (Tr. 801-805). At all events, any prejudice that might have been caused by Frederick Grimes' claim of privilege was cured by the district court's immediate instruction to the jury to disregard it. See *Namet* v. *United States*, *supra*, 373 U.S. at 187.

[4] The district court found that the prosecutor's question had been asked in good faith. Although Frederick Grimes had refused to answer a similar question in a pretrial interview, the prosecutor was not informed that he would again assert the privilege at trial (Tr. 814). Moreover, the prosecutor explained that he believed that Grimes could not properly claim the privilege in response to that question because the statute of limitations for any criminal offense relating to a failure to report that income had expired prior to trial (Tr. 814).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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